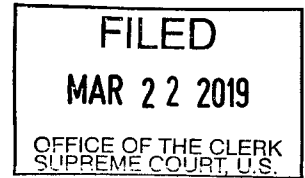


18-8775 ORIGINAL
No.

IN THE
SUPREME COURT OF THE UNITED STATES



Samuel William Maines,

Petitioner,

v.

United States of America,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

Petition For A Writ Of Certiorari

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QUESTIONS PRESENTED

(1) Should the Fifth Circuit's unreasoned summary denial of a Certificate of Appealability be remanded for further consideration?

(2) Can an implied waiver of the attorney-client privilege allow admission of privileged testimony even after the claims forming the basis of the waiver have been denied with prejudice?

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unpublished but may be indentified by Appeal No. 17-10497 and appears in pages 8-9 of the appendix of this Petition. The Fifth Circuit's opinion concerning the Motion for Reconsideration appears in page 1 of the appendix. The opinion of the United States District Court for the Northern District of Texas, Dallas Division, appears at 2015 U.S. Dist LEXIS 176089 (N.D. Tex., June 2, 2015) and at pages 33-59 of the appendix.

JURISDICTION AND TIMELINESS

The district court in the Northern District of Texas, Dallas Division, had jurisdiction over this federal habeas action pursuant to 28 U.S.C. § 2255. The court of appeals had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291, and over the motion for a Certificate of Appealability pursuant to 28 U.S.C. § 2253(c). The court of appeals issued its opinion and judgment on November 19, 2018 and its denial of the motion for reconsideration on December 26, 2018. This petition is therefore timely filed prior to March 26, 2019 (90 days from the denial of the motion for reconsideration.) See Missouri v. Jenkins, 495 U.S. 33 (1990). The date and circumstances of the mailing of this petition are found in the certificate of service.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner Maines was arrested on May 2, 2012, on charges of possession of child pornography. Critically, Maines categorically denied any knowledge of possessing such material. It is well settled that statutes criminalizing possession of child pornography require knowledge of both "the sexually explicit nature of the material" and "the age of the performers". United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994). Maines knew of neither, nor did he have knowledge of the existence of the alleged material. Because Maines denied an essential legal element of the offense charged, he in effect denied committing the offense at all. Despite this, Maines was arrested, detained, indicted, and, most critically, urged to plead guilty by his attorney. From this, Maines could only surmise and conclude that knowledge of the unlawful images was in fact not an element of the offense charged. Believing, then, that his chances of success at trial were zero, Maines entered a guilty plea and was sentenced to 120 months imprisonment on November 15, 2012.

Maines timely filed a motion under 28 U.S.C. § 2255 to vacate the conviction on the grounds that the guilty plea was involuntary — because it was entered without awareness of the true nature of the offense¹ — and that counsel rendered ineffective assistance. After years of back-and-forth litigation, an evidentiary hearing was held on March 8, 2017. At the hearing, Maines's former counsel, George Johnson, conceded that Maines's guilty plea was involuntary. See App. 42 (Maines "indicated to me that he didn't want to take responsibility for what had happened, ultimately.") Nevertheless, the district court denied Maines's motion on the basis of Maines's "character". See App.50-51.

1. See Smith v. O'Grady, 312 U.S. 329, 334 (1941) (voluntary guilty plea requires that defendant receive "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.")

A 23-page motion for a Certificate of Appealability ("COA") was filed in the Fifth Circuit Court of Appeals on April 20, 2018. See App. 10-32. Seven months later, the Appellate Court denied COA in a two-page, two-paragraph order. See App. 8-9. Maines then filed a Motion for Reconsideration complaining that the Appellate Court did not adequately address Maines's arguments in favor of granting COA. See App. 2-7. The motion was denied in a one-page, one-paragraph order on December 26, 2018. See App. 1.

REASONS FOR GRANTING THE PETITION

Question # 1 - Should the Fifth Circuit's unreasoned summary denial of a Certificate of Appealability be remanded for further consideration?

There can be no appeal from a final order in a § 2255 proceeding unless a COA issues. 28 U.S.C. § 2253(c)(1). Therefore the denial of a COA often constitutes the "end of the line" for an individual seeking relief from an unconstitutional conviction. It then follows that a court tasked with the serious responsibility of deciding a motion for COA should apply great care in doing so. This Court has issued guidance as to how such motions should be handled: reviewing courts are to conduct "a threshold inquiry into the underlying merit" of the claim. Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).

The Fifth Circuit's bare-bones opinion in this case gives no indication that the required threshold inquiry — or indeed any inquiry — was in fact conducted. Beyond a boilerplate recitation of the standard for deciding COA motions, and a summary declaration that Maines failed to meet the standard, the opinion is silent. The denial of the Motion for Reconsideration is of even less substance. At 279 characters, the order could fit inside a "Tweet".

The standard for obtaining COA focuses only on the extent to which the claims presented are "debatable". Maines's Motion for COA noted that this habeas action began in 2013, and has involved extensive litigation (including

an evidentiary hearing). The issues presented were found not to be frivolous by the Fifth Circuit — that is, that the claims do not lack "an arguable basis in law or fact". See App. 4. The motion contended that the Fifth Circuit's findings weigh heavily in favor of granting COA because it is difficult to imagine how a claim could be "arguable" but not "debatable". In addition, the debatability of each issue for which Maines sought certification was extensively briefed in the Motion for COA. See App. 16-31.

In light of these facts, it strains credulity that Maines could have failed to meet the comparatively low bar of demonstrating that his claims are "debatable". Moreover, because the Fifth Circuit reached its conclusion without any analysis whatsoever of the underlying claims, it is clear that the court has "so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory power." Rule 10(a) of the Rules of the Supreme Court.

This Court should, at minimum, grant Certiorari and remand this case to the Fifth Circuit with instructions to conduct a substantive inquiry of the merits of Maines's claims.

Question # 2 - Can an implied waiver of the attorney-client privilege allow admission of privileged testimony even after the claims forming the basis of the waiver have been denied with prejudice?

Maines was represented during the entry of the guilty plea by George Johnson. But the plea was originally negotiated by Doug Morris, who withdrew prior to rearraignment. Maines's § 2255 Motion raised claims against both Johnson and Morris. But the government argued, and the District Court agreed, that any claim against Morris was necessarily irrelevant because Morris did not represent Maines at the entry of the guilty plea. See App. 17-19. The claims against Morris were denied with prejudice prior to the evidentiary hearing

and before Morris could respond. Nevertheless, Morris was called to testify at the hearing, and his testimony was admitted — to the fatal detriment of Maines's case — on the ground that Maines had implicitly waived the attorney-client privilege by claiming that Morris had been ineffective. See App. 19-20.

The doctrine of implied waiver has long been recognized. See Hunt v. Blackburn, 128 U.S. 464 (1888). But its core concern is "fairness". See, e.g., United States v. Woodall, 438 F.2d 1317, 1324 (5th Cir. 1970) (en banc); Bittaker v. Woodford, 331 F.3d 715, 719 (9th Cir. 2003). In essence, the doctrine holds that, if a defendant alleges that his former attorney was ineffective, fairness demands that the attorney-client privilege be waived such that the attorney can properly respond to and defend against the allegations. But in this case, the claims against Morris were deemed irrelevant and denied, with prejudice, without being considered and without Morris having responded. Yet Morris was nevertheless allowed to testify concerning privileged communications — resulting in substantial prejudice.

It is utterly inconceivable that the doctrine of implied waiver was intended to produce this bizarre and manifestly unfair result. Yet the die has been cast, and it is now established precedent, at least in the Fifth Circuit, that a prospective ineffective-assistance claimant must bargain for the possibility that his claims will be heard by accepting the certainty that his privilege will be forever waived.

The importance of the attorney-client privilege is well established. See, eg., Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998). As such, it should never be tossed aside in such a cavalier manner. In holding otherwise, the Fifth Circuit "has decided an important question of federal law that has not been, but should be, settled by this Court". Rule 10(c) of the Rules of the Supreme Court.

CONCLUSION

For the reasons stated herein, this Court should grant the petition for a writ of certiorari in order to resolve the important federal questions presented, or, in the alternative, remand the case to the Fifth Circuit for further and more thorough consideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Samuel William Maines, hereby solemnly swear under penalty of perjury (28 U.S.C. § 1746) that I have forwarded the foregoing "Petition For A Writ Of Certiorari" to the Clerk of the Court, United States Supreme Court, 1 First Street NE, Washington, DC 20543. I have placed the same in the hands of my prison officials for proceeding as outgoing legal mail, first class postage prepaid, on this 22nd day of March, 2019.

Samuel Maines
 Samuel William Maines

CERTIFICATE OF COMPLIANCE

I, Samuel William Maines, hereby solemnly swear under penalty of perjury (28 U.S.C. § 1746) that the foregoing petition complies with all appropriate court rules, including the Rules of the Supreme Court, to the best of my ability considering my status as an unrepresented, incarcerated prisoner. I humbly seek that this Court overlook or excuse any deficiencies that may exist herein. See Haines v. Kerner, 404 U.S. 519, 520 (1972) (holding pro se petitions "to less stringent standards than formal pleadings drafted by lawyers".)

Samuel Maines
 Samuel William Maines